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IN THE

Supreme Court of the United States

No. 478

FEDERAL DEPOSIT INSURANCE CORPORATION,
Petitioner,

against

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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I.

The question of deductibility of reciprocal bank balances is not academic, and was wrongly decided.

The opinion below would establish a general limitation on deposit assessments, by permitting assessment only of those deposits which are ordinary or "usual". No such limitation is found in the statutory command to pay assessments on "the amount of the liability of the bank for deposits" (Sec. 1817(a); Petn. p. 34). Respondent's "ordinary deposit" theory is one which banks have advanced unsuccessfully in other cases (Petn. pp. 12-13, 29). Such an indefinite standard would be impossible to administer and would encourage further litigation. This Court should clarify the interpretation of the statute by rejecting such a limitation.

Corollary to this "ordinary deposit" theory is the idea that only insured deposits are assessable. The statutory scheme of separate definitions for "deposit" and "insured deposit" (Sec. 1813; Petn. p. 33) should defeat this idea, but respondent's brief repeats it in the statement that "insurance is the *raison d'etre* of the Federal Deposit Insurance Act" (p. 5). Congress deliberately made the assessment base broader than the amount of insured deposits, in order to make sure that large and strong banks like respondent would make an adequate contribution to the stability of the entire banking system.

As Chairman Crowley said at the 1935 Hearings:

> "The benefits of deposit insurance are not limited solely to the protection of the individual depositor. • • • The benefits which will accrue to the large city banks because of greater stability in the country banks, are real and tangible.
>
> "• • • The raising of a sufficient revenue, solely through the laying of premiums against the deposits of those receiving direct insurance benefits, will not be a fair distribution of the burden" (See Banking Act of 1935, Hearings before Subcommittee of Senate Committee on Banking and Currency, 74th Cong., 1st Sess., S. 1715, p. 29).

Respondent attempts to belittle the items in dispute by asserting that petitioner can plead the Statute of Limitations against other banks which have paid the assessment that the Court below has disallowed (p. 4). That the error of a decision is minimized by the Statute of Limitations is not an appealing basis for giving it permanence.

The distinction between loans and deposits in *Texas & Pacific Ry. Co.* v. *Pottorf*, 291 U. S. 245, 259 (1934) (Resp. Br. p. 7), does not justify the assertion made by respondent that a reciprocal deposit is not an indebtedness. Loans

and deposits both constitute "indebtedness". Nor can time deposits be called "relatively minor" (p. 6). They amounted to over 30% of total deposits in both 1950 and 1956. F.D.I.C. Ann. Rep., 1950, page 238; Ann. Rep., 1956, page 107.

The cases which respondent cites on statutes *in pari materia* have no relevance. They apply the principle only to resolve some ambiguity in the statute, which did not exist here; and they apply only to statutes which are more closely related than these. For instance, *Merrill* v. *Fahs*, 324 U. S. 308, 313 (1945), involved *identical language* in the estate tax and gift tax statutes, administered *by the same agency*. Not only is F.D.I.C. separate from the Federal Reserve Banks and the Comptroller of the Currency, but the purposes of regulation by the three agencies differ (Petn. pp. 12-14), and neither of the other statutes contains any definition of deposits. The differences were emphasized by Congress' action in 1950 in separating the Federal Deposit Insurance Act from the Federal Reserve Act.

Moreover, even under the 1950 Federal Deposit Insurance Act only the reciprocal portion of interbank deposits may be deducted for assessment purposes, while the Federal Reserve Act permits deduction of *all* interbank deposits for reserve computation purposes (12 U.S.C.A. § 465). The purpose of permitting this broad deduction under the Federal Reserve Act was to benefit small country banks, which might have moneys due from large city banks, but no sums due to other banks. (See Banking Act of 1935, Hearings cited on preceding page, p. 169.) The decision below reaches the opposite result, by favoring a large bank like respondent.

It is pointless for respondent to cite statistical computations in which F.D.I.C. excluded reciprocal deposits after

1942 (p. 8, n. 7). F.D.I.C. admittedly enforced payment of assessments on reciprocal deposits during that same period. This should not forbid its obtaining statistics to measure other items than assessable deposits. The F.D.I.C. reports have made clear that deposits for reports of condition differ from deposits for assessment purposes. F.D.I.C., Ann. Rep., 1949, pages 57-58.

Finally, respondent misquotes the record when it says that petitioner's witness "repudiated" the charge of concealment (p. 4, n. 3). Clearly, respondent concealed its true position, when it continued not to pay on the bulk of reciprocal deposits but wrote that it was paying an additional assessment "in compliance with" petitioner's demand (J. A. 148). Anderson admitted only that petitioner could have ascertained what respondent was doing, *if a comparison had been made* between the demand and the response (J. A. 106). But the failure of the staff to make that comparison does not estop a government agency like F.D.I.C. from enforcing respondent's statutory liability.

United States v. *California*, 332 U. S. 19, 39-40 (1947);

Wilber National Bank v. *United States*, 294 U. S. 120, 123-24 (1935).

The Petition covers the other assertions of the Brief in Opposition, respecting the need for review of the decision concerning reciprocal balances.

II.

The double deduction for cash items whose collection respondent accelerated raises questions of continuing importance.

1. Respondent asserts that, because of the changes made by petitioner's 1954 Regulations, the issues under this point "are no longer live ones" (p. 2). It fails to

mention that an important feature of the case is not affected at all by the 1954 amendments to the Regulations.

The Court held that the 1950 Regulation was void as inconsistent with the statute, to the extent that it required that items claimed for *double* deduction be both received and forwarded on base days (Petn. p. 46). Respondent incorrectly states that this Regulation was superseded in 1954 (p. 15). The 1954 Regulation still permits double deduction under method (aa) only of items "which were received" on the base day (J. A. 199). If the 1950 Regulation was void, it would follow that the similar 1954 Regulation is void, unless this Court reviews the question.

Respondent leaves unanswered our description (Petn. p. 20) of the temptation that would exist, without this regulation, to manipulate "float" during the period before the base day and thus reduce insurance assessments to the detriment of petitioner and all insured depositors.

The Court committed a startling inconsistency in holding that petitioner *must* broaden the base "day" to cover a three-day weekend, but yet can *not* interpret the statute under its regulatory power, by limiting double deductions to items which were received as well as forwarded on the base day, in order to prevent evasion of the statutory purpose.

The validity of the regulation adopted in 1950 and repeated in 1954, requiring that items deducted as "float" must have been received on the base day, is a very live issue and an important one to petitioner.

Moreover, the general scope of petitioner's rule-making power and the assertion that amendments to its regulations must be retroactive in spite of the express contrary statement by petitioner in the amendatory regulations themselves (J. A. 193), are both live issues as long as petitioner continues to function.

2. The grant of a double deduction for "float" in the 1950 Act was based on the assumption that the average time for collecting such "float" was two days. Respondent accelerated the collection by forwarding items on Friday or Saturday instead of Monday; nothing in the statute entitled it still to claim a double deduction for items which were not in fact "forwarded for collection on the assessment base days" (Petn. p. 34). Denying the double deduction in such circumstances is not penalizing efficiency, as respondent claims (p. 14), but merely conforming to the statutory language and purpose.

Both here and in its statement that it "loses the right to deduct" certain items (p. 11), respondent confuses the two methods provided under the statute. If it uses the (bb) method it can deduct *all* uncollected items; but it cannot deduct *twice* the amount of uncollected items under the (aa) method unless they were forwarded "on the assessment base day".

Judge Birdzell's statement at the 1950 House hearings (Resp. Br., p. 13) does not justify respondent's contentions. Judge Birdzell had left the F.D.I.C. in 1940. He was not the author of the new bill nor a member of the Congress. His colloquial paraphrase of the bill was not directed to the present question and in any event could not alter its wording.

In a statute which permits deduction of twice the amount of uncollected items, any judicial departure from the statute and regulations for computing these deductions is of great importance and merits the consideration of this Court.

III.

Dealer reserves.

With respect to the assessability of dealer reserves, we rest upon our petition.

CONCLUSION

The writ of certiorari should be granted as prayed.

Dated: October 29, 1957.

Respectfully submitted,

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION.

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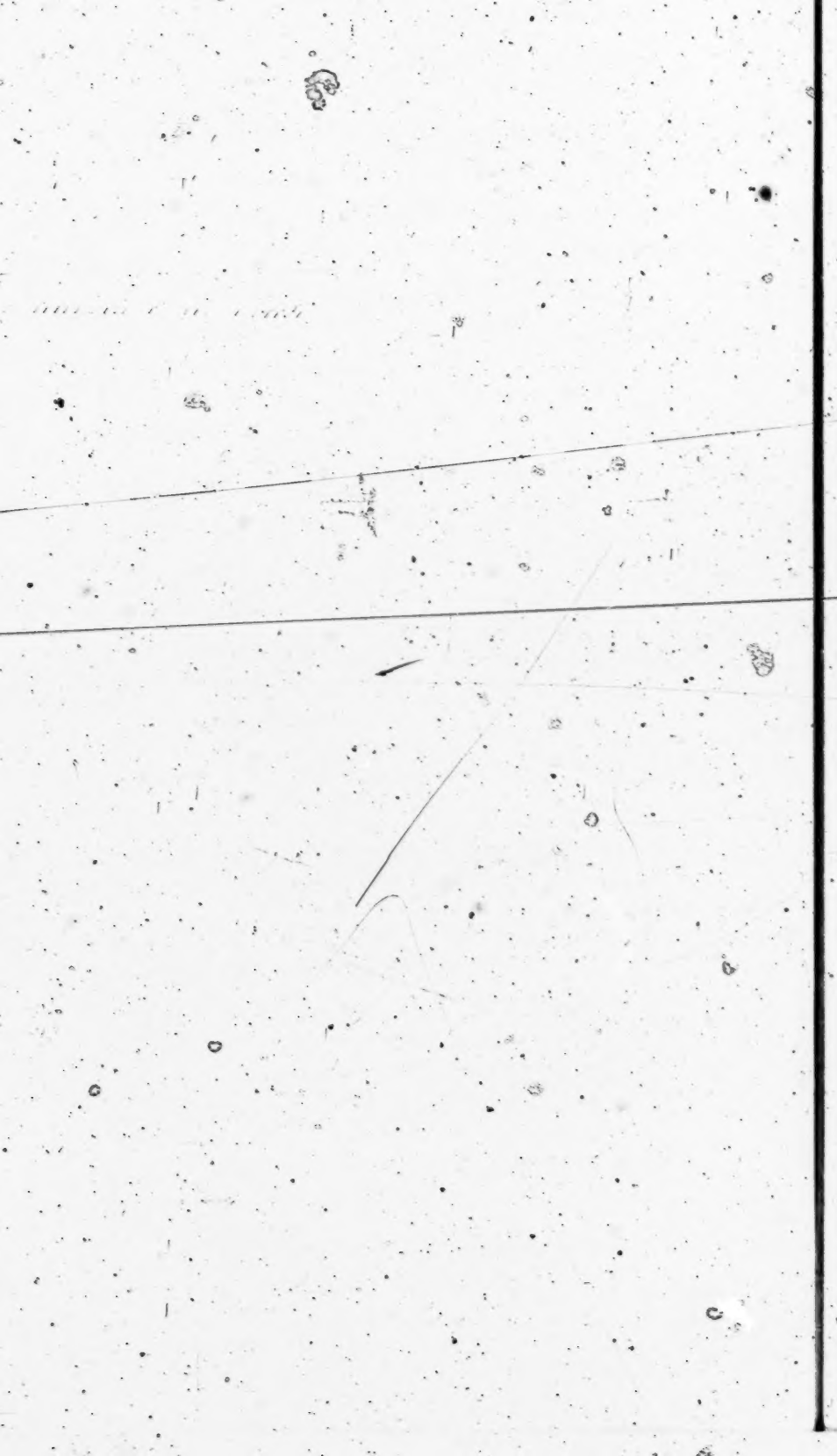

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OPINIONS BELOW.

The opinion of the Court of Appeals is reported in 245 F. 2d 567. The memorandum opinion of the District Court is unreported, and is printed in the Joint Appendix on which the case was heard in the Court of Appeals (J. A. 163-4).

JURISDICTION.

The jurisdictional requisites are adequately set forth in the petition.

STATUTES INVOLVED.

The statutes involved are adequately set forth in the Appendix to the petition.

QUESTIONS PRESENTED.

1. In computing assessments for the years 1948 to 1950 was the respondent Bank entitled to reduce the amount of deposits of other banks in respondent by the amount of the balances in the reciprocal deposit accounts which respondent maintained with those banks?

The amount of additional assessments which petitioner (herein sometimes referred to as FDIC) claims under this item is $24,755.42. Under the Federal Deposit Insurance Act of 1950, which is now in force, there is no doubt as to respondent's right to make these deductions (12 USCA, § 1817(a)(1)). The question is, therefore, now academic.

2. In computing the statutory deduction for uncollected cash items for the years 1950 to 1952, was respondent entitled to deduct twice the amount of uncollected items credited on the base day, but not received and forwarded on the calendar base day?

This item involves a total of $64,590.77, which petitioner seeks by way of additional assessments. The issues involved in this controversy are no longer live ones, inasmuch as under the 1954 Regulations promulgated by FDIC, the validity of respondent's deductions is expressly recognized.

3. Did the amount of credits arising under "contract reserve" accounts constitute deposits under the 1935 Act?

Under this item petitioner seeks to recover from respondent additional assessments of $2,442.52 for the years 1948 to 1950. This controversy cannot arise under the

1950 statute now in force, and this question is also, therefore, academic.

The facts and arguments as to each point will be stated separately.

I.

Reciprocal Deposits.

Facts.

Respondent bank had reciprocal deposit accounts with some 26 banks (J. A. 13); that is, in each of these instances respondent bank had deposits with another bank and the other bank maintained deposits with respondent bank. For example, if Bank A had a deposit account in Continental of $250.00 and Continental had a deposit balance in Bank A of $100.00, Continental would include only the difference in its deposit liabilities for assessment purposes namely, $150.00. FDIC claims that the entire $250.00 should be counted.

Respondent's position is supported by the directive from the Federal Reserve Bank:[1] "that reciprocal interbank demand balances * * * hereafter are to be reported Net instead of Gross", and the instructions of the Comptroller of the Currency[2], each of which requires only the net balance in such situations to be counted.

1. Circular No. 1087, July 1, 1942, J. A. 162-3; cf. Federal Reserve Act of 1913, § 19, as amended 49 Stat. 684, 714, 12 U. S. C. A. § 465.

2. The Comptroller of the Currency issued written instructions to banks in June, 1942 which required banks to report reciprocal accounts on a net basis (J. A. 162).

Argument.

1. Although there is a dispute between the parties as to whether respondent owes the FDIC $24,755.42 for the years 1948, 1949 and 1950,[3] it is not disputed that after 1950 assessments should be based only on the net balance of reciprocal deposits, as the Act of 1950 provides expressly that banks are authorized to deduct "from the deposit balance due to an insured bank the deposit balance due from such insured bank * * * which is subject to immediate withdrawal" (12 USCA §1817(a)).

The petitioner implies that an enormous amount is involved because in 1950 the aggregate volume of reciprocal bank deposits totaled $670,000,000 (Pet. p. 11). But no such amount can be affected by this case. Even for 1950 only the amount of the assessments, that is 1/12 of 1% of that sum, or at most $558,333.33 could have been claimed from all banks, if petitioner is correct in its view of the law. Out of 13,600 insured banks only forty other banks originally took the same position as respondent, but all subsequently paid the assessments demanded by the FDIC, with only two paying under protest (J. A. 71, 125).[4] Since these were payments voluntarily made they cannot be recovered. *United States* v. *Wilson*, 168 U. S. 273.

Furthermore, by now the 5 year Statute of Limitations (12 U. S. C. A. § 1817 (g)) would have expired on any suits not yet brought. The decision below can, therefore,

3. It is to be noted that although petitioner concedes that defendant has been making this deduction since 1937, it did not bring suit until 1954. Its intimation (Pet. p. 5) that respondent was concealing what it was doing is repudiated by its own witness (J. A. 106), and disproved by the correspondence (J. A. 148-149).

4. "This [FDIC's] interpretation was acquiesced in by all insured banks except two. Those two paid their assessments on reciprocal bank accounts under protest." (Petitioner's Opening Brief in Court of Appeals, page 32).

affect no other case but this one, which involves only $24,755.42, and perhaps disputes with the two other banks which paid under protest.

2. On the merits, the issue turns upon the meaning of the phrases, "usual course of business" and "indebtedness" in § 264 (c) (12) (h) (1) of the 1935 Federal Deposit Insurance Act (49 Stat. 688), which was, as we have seen, superseded in 1950. The 1935 Act provided that assessments should be based on the "total amount of liability of the bank for deposits (according to the definition of the term 'deposit' in and pursuant to paragraph 12, subsection (c) of this section without any deduction for indebtedness of depositors) * * *." Subsection (c) of paragraph 12 provided that deposit meant "the unpaid balance of money or its equivalent received by a bank in the usual course of business. * * *"[5]

(a) Reciprocal deposits are not received "in the usual course of business". As the court below declared, "reciprocal deposits are for the convenience of the banks involved and their customers. They add nothing to the earnings of either bank except the bank which holds a net balance." "It is the ordinary and usual deposits of a bank which measure its strength, its growth and development" (Pet. App. p. 41). Only 300 to 400 of the 13,600 insured banks in the country carry reciprocal accounts. (Pet. App. 42) Since, in the case of reciprocal deposits, one offsets the other, there is no reason why more than the net balance need be insured; insurance is the *raison d'etre* of the Federal Deposit Insurance Act. For these reasons, Congress, confirming the pre-existing banking practices, made it clear in 1950 that reciprocal deposits should not be included in the assessment base.

It is important to note that the statutory language (49

5. The statutory provisions are quoted in full on pp. 32-33 of the Petition.

Stat. 688) on which assessments are based was and still is "liability for deposits", not merely "deposits". Since a bank is only liable to the bank with which it has a reciprocal account for the net amount, it is clear that the respondent properly deducted the amount of reciprocal accounts in computing the basis for assessments.

As stated in *Grays Harbor National Bank* v. *Johnson*, 151 Wash. 266, 275 P. 697, 699 (1929), in considering reciprocal accounts between banks, one of which was in receivership:

> "This results in the one having the least total credits against the other being entitled to set off such total credits against the total credits of the other, and to have the balance only regarded as owing from one to the other. * * *"

(b) Petitioner relies upon the fact that the statutory provision stated that there should not be "any deduction for indebtedness of depositors." The word "indebtedness" undoubtedly was meant to refer to the usual situation of a depositor who borrows money from a bank.

The term "indebtedness", which is not used elsewhere in the Act, must be differentiated from the term "deposit", which is used frequently, in accordance with the well settled canon of statutory construction that each word should be given a distinct meaning. (*McDonald* v. *Thompson*, 305 U. S. 263, 266). Although deposits from banks in which an offsetting amount is deposited are deposits and obligations, they would not normally be thought of as "indebtedness".

Banks find it necessary further to distinguish between their own deposit liabilities and *indebtedness* of depositors to them. Deposits must be kept available to bank customers according to the deposit contract, and deposits, except for a relatively minor volume of time deposits, are

payable on demand. On the other hand, many loans are time loans and it is generally held that no right exists in behalf of the bank (except in cases of insolvency) to offset deposits of customers against indebtedness which is not yet due and payable (*7 Zollman, Banks and Banking*, § 4433 (1936)). Therefore, the relation of a bank to its ordinary customers is generally not one of mutual debits and credits as in the case of reciprocal bank accounts. A further difference between offsetting reciprocal bank deposits and offsetting indebtedness of borrowers against deposits is that banks are required to offset reciprocal deposits and thus avoid inflating the amount of their true deposit liability, but the offsetting of the indebtedness of a borrower, if the right should be a present one, is a matter of election by the bank because it may have other collateral or other reasons for not exercising its right of offset (*7 Zollman, Banks and Banking*, § 4633).

This Court has recognized the distinction between loans and deposits. (*Texas & Pacific Railway Company* v. *Pottorf*, 291 U. S. 245, 259.)

FDIC at an early stage recognized that deposits by banks were in a separate category from those of other depositors. Its 1934 Annual Report, p. 144, contains instructions, which state, *inter alia*:

> "Deposits of banks, bankers and trust companies must be reported separately from deposits of other depositors."

Petitioner (p. 15) cites its 1942 Annual Report in which it quotes briefly from Chairman Crowley's testimony before the Senate Committee on Banking and Currency. The petition states that the FDIC stated that it was "assessing interbank deposits." Petitioner fails to point out that on pages 80 and 81 of the same report, it is indicated that the reciprocal amounts were not included in the